

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MERLE NICHOLS,

Plaintiff,

v.

GEICO GENERAL INSURANCE
COMPANY,

Defendant.

CASE NO. C18-1253-RAJ

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Defendant GEICO General Insurance Company ("GEICO") filed a Motion for Protective Order, requesting oral argument. (Dkt. 61.) Plaintiff opposes the Motion. (Dkt. 64.) Now, having considered the motion, related briefing, and the remainder of the record, the Court finds oral argument unnecessary and herein GRANTS in part and DENIES in part defendant's Motion for Protective Order. (Dkt. 61.)

BACKGROUND

As observed in plaintiff's opposition, this suit concerns GEICO's use of "maximum medical improvement" (MMI) in adjusting Personal Injury Protection (PIP) claims in Washington State. Plaintiff filed suit on behalf of himself and all others similarly situated, but the parties

1 stipulated to and jointly requested a suspension of deadlines, including the deadline for seeking
2 class certification, while awaiting a ruling on a previously pending motion to compel. (*See* Dkt.
3 28.) The Court thereafter held oral argument and issued an Order Granting in Part and Denying
4 in Part Plaintiff's Motion to Compel discovery from GEICO. (Dkt. 56.)¹

5 The Court's Order addressing the motion to compel clarified the parameters of a Request
6 for Production (RFP) of correspondence and/or other communication referring or relating to
7 GEICO's "engagement of physicians (or groups of physicians) to evaluate PIP claims" by
8 Washington claimants, while noting plaintiff's entitlement to resume third-party discovery, and
9 outlined its ruling regarding GEICO's production of a representative sample of claims to be used
10 to respond to other discovery requests. Defendant now moves for a protective order relating to
11 three Subpoena Duces Tecum (SDT) plaintiff submitted to third parties Dane Street, Medical
12 Consultants Network (MCN), and MES Solutions, Inc. (MES), identified by plaintiff as
13 contracting with defendant GEICO to perform independent medical examinations (IME). (Dkt.
14 61, Exs. 1-3.)

15 DISCUSSION

16 A party may, in discovery, issue a Rule 45 subpoena to a non-party seeking the relevant
17 and proportional discovery allowed for under Rule 26. *See* Fed. R. Civ. P. 26(b)(1) and 45. *Silcox*
18 *v. AN/PF Acquisitions Corp.*, C17-1131-RSM, 2018 WL 1532779 at *3 (W.D. Wash. Mar. 29,

19
20
21 ¹ Consistent with the request contained in the stipulation, the Court ordered the parties to "submit
22 new proposed dates for the deadlines relating to class certification within fifteen days of the Court's ruling
23 on Plaintiff's Motion to Compel." (Dkt. Entry dated April 15, 2019.) The Court ruled on the motion to
compel on January 8, 2020, defendant filed its motion for a protective order on March 5, 2020, and the
parties have not, to date, submitted new proposed deadlines relating to class certification.

2018) (citations omitted).² An opposing party has standing to seek a protective order to limit the third-party discovery. *Silcox*, 2018 WL 1532779 at *3 (citation omitted).

Even where relevant and proportional, the Court may limit discovery pursuant to Rule 26 where it is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C)(i). The Court may also, for good cause, “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding the disclosure or discovery . . . [or] forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters[.]” Fed. R. Civ. P. 26(c)(1)(A), (D). “The party seeking a protective order has the burden to demonstrate good cause, and must make ‘a particular and specific demonstration of fact as distinguished from stereotypical and conclusory statements’ supporting the need for a protective order.” *Silcox*, 2018 WL 1532779 at *3 (quoting *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426, 429-30 (M.D. Fla. 2005) (quoted source omitted)). *See also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (requiring demonstration of harm or prejudice that will result from discovery).

Rule 45 also provides for the Court’s ability to quash or modify a subpoena. Fed. R. Civ. P. 45(d)(3). For example, on timely motion, the Court must quash or modify a subpoena that subjects a person to undue burden, and may, “to protect a person subject to or affected by a subpoena,” quash or modify a subpoena requiring disclosure of “commercial information[.]” Fed.

² Rule 26 specifically provides for discovery of any nonprivileged matter both relevant to a claim or defense and proportional to the needs of the case, “considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit[.]” Fed. R. Civ. P. 26(c)(1).

1 R. Civ. P. 45(d)(3)(A)(iv), (B)(i). While there is no Ninth Circuit authority providing a party
2 standing to quash a third-party subpoena, district courts generally recognize an assertion of
3 privilege as providing such standing. *Robertson v. Catholic Cmty. Servs. of W. Wash.*, C19-1618-
4 RSM, 2020 WL 1819842 at *5 (W.D. Wash. Apr. 10, 2020) (citing *Cal. Sportfishing Prot. Alliance*
5 *v. Chico Scrap Metal, Inc.*, 299 F.R.D. 638, 643 (E.D. Cal. 2014)). *See also Allstate Insurance*
6 *Co. v. Lighthouse Law P.S. Inc.*, C15-1976-RLS, 2017 WL 497610 at *3 (W.D. Wash. Feb. 7,
7 2017) (“A party has standing to quash a subpoena issued to a third party only where the party
8 asserts a ‘legitimate privacy interest in the material sought.’”) (quoting *Abu v. Piramco Sea-Tac*
9 *Inc.*, No. C08-1167-RSL, 2009 WL 279036 at *1 (W.D. Wash. Feb. 5, 2009)).

10 GEICO here argues the scope of the SDTs are improperly broad and disproportionate to
11 the case. GEICO concedes plaintiff may be entitled to some discovery from third party MCN
12 relating to his own claim, the IME performed by MCN, and documents demonstrating GEICO’s
13 contractual relationship with MCN, if any. However, GEICO maintains plaintiff improperly seeks
14 to obtain information on individual GEICO claimants in order to look for new class representatives
15 or to pursue individual claims when class certification is denied. GEICO contends the Court
16 already limited the scope of allowable discovery to the sample produced in response to the motion
17 to compel. GEICO also takes issue with the fact the SDTs seek GEICO insureds’ protected health
18 information and proprietary GEICO information regarding its contractual relationships (which
19 may include sensitive agreed-upon pricing, etc.). It asserts putative class members’ personal
20 identifying information is not discoverable at this pre-certification stage of the proceedings and
21 rejects the sufficiency of telling third parties they “may” redact personal identifying/specific
22 medical information. (*See* Dkt. 61, Exs. 1-3.) GEICO notes plaintiff did not include with the
23 SDTs the Court-Ordered Protective Order requiring such redaction (*see* Dkt. 23), agree to

1 compensate the third parties for the time and expense required for redaction, or even offer GEICO
2 the opportunity to perform the redaction. GEICO also, in addition to other arguments and in lieu
3 of quashing the SDTs, requests specific limitations for Requests 3-11, including limitations
4 associated with vague terms, overbroad, vague, and ambiguous requests, and requests seeking
5 information beyond the relevant time period. (*See* Dkt. 61 at 10-12.)

6 Plaintiff contends GEICO misrepresents the record in this case and the Court's Order on
7 the motion to compel. Plaintiff maintains GEICO waived any objections to and is judicially
8 estopped from preventing discovery from the IME providers given the Court's ruling explicitly
9 allowing for such discovery. Plaintiff also asserts GEICO lacks standing to raise objections on
10 behalf of third parties. Plaintiff, finally, rejects any contention it is not allowed to conduct
11 discovery to determine whether GEICO utilized MMI to craft a class certification motion. GEICO
12 counters plaintiff's arguments in its reply (Dkt. 65) and includes the letters objecting to the SDTs
13 submitted by each third-party recipient (*id.*, Ex. 4).

14 As discussed below, the Court agrees with plaintiff that GEICO, at least in part, fails to
15 accurately portray either the Court's ruling on the motion to compel or the information now sought
16 by plaintiff. The Court also finds GEICO entitled to certain limitations in the SDTs submitted to
17 third parties.

18 A. Contracts and Forms

19 The Court's Order addressing plaintiff's motion to compel considered an RFP calling for
20 production of "all correspondence and or other communication that refers or relates to
21 Defendant's engagement of physicians (or groups of physicians) to evaluate PIP claims made to
22 you by PIP claimants in the State of Washington from July 24, 2012 to present[.]'" (Dkt. 56 at 2.)
23 The Court noted with respect to this RFP:

1 . . . Plaintiff has clarified that: (a) he is seeking production
 2 of the contract or contracts between GEICO and an IME provider –
 3 whether the provider is an individual physician, or a vendor of
 4 services like MCN – and GEICO need not produce “all
 5 correspondence” that refers or relates to the contract itself; (b) he is
 6 seeking any “standard” questions or list of approved questions that
 7 GEICO has exchanged with the individual providers of IME’s or
 8 IME vendor; and (c) he is seeking responsive documents – as in the
 9 specific questions GEICO asked the IME physician or IME vendor
 10 to opine on – for PIP claims arising in the State of Washington from
 11 July 24, 2012 through January 3, 2019, with redactions for personal
 12 identifying information.

13 (*Id.*) The Court directed GEICO to produce all responsive documents to this discovery request or
 14 to certify it had no custody or control over any such documents, and clarified that the requirement
 15 to produce documents in GEICO’s custody and control did not require GEICO to obtain documents
 16 from a third party. The Court further ordered as follows: “Plaintiff shall also be entitled to resume
 17 his discovery from third-parties, like MCN, for responsive documents. GEICO shall not object to
 18 any such efforts to obtain responsive documents from third parties.” (*Id.*)

19 Contrary to GEICO’s contention, the Court did not limit allowable discovery to the sample
 20 produced in response to the RFP discussed below and, indeed, explicitly provided for plaintiff’s
 21 ability to seek discovery from third parties. Nor is the Court precluded from allowing such
 22 discovery. The Court, instead, retains broad discretion over the class certification process. *Vinole*
 23 *v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009). The decision of whether or
 not to permit discovery “lies within the sound discretion of the trial court.” *Id.* (quoting *Kamm*
v. Cal. City Dev. Co., 509 F.2d 205, 209 (9th Cir. 1975)) (also stating: “Our cases stand for the
 unremarkable proposition that often the pleadings alone will not resolve the question of class
 certification and that some discovery will be warranted.”). *Cf. Mantolet v. Bolger*, 767 F.2d 1416,
 1424 (9th Cir. 1985) (trial court does not abuse discretion in refusing to allow class discovery

1 where a plaintiff does not advance “a prima facie showing that the class action requirements of
2 Fed. R. Civ. P. 23 are satisfied or that discovery is likely to produce substantiation of the class
3 allegations.”)

4 A number of the SDT requests seek the same or similar information from third parties as
5 that allowed for in the above-described RFP to GEICO. Specifically, Request 3 seeks “contracts”
6 between GEICO and the third party regarding the performance of medical examinations in
7 Washington, while Requests 4-7 seek “generic forms” (1) containing “instructions” created or used
8 by GEICO or the third party for performing the medical examinations (Request 4); (2) relating to
9 GEICO’s monitoring or supervision of the third party’s performance to ensure compliance with
10 GEICO’s instructions (Request 5); (3) containing “oversight conditions” used by GEICO in
11 connection with the third party’s retention (Request 6); and (5) consisting of forms drafted by
12 GEICO or used by the third party for the examinations “(including but not limited to questions the
13 medical practitioner is instructed to answer)” (Request 7). (Dkt. 61, Exs. 1-3.) In each of these
14 requests, plaintiff clarifies the third party is “not being asked to produce copies of completed
15 medical assessments performed by [the third party] or its doctors[.]” (*Id.*) The requests for
16 contracts and generic forms do not, as such, implicate GEICO’s concerns regarding a search for
17 class representatives or individual claimants or the privacy of GEICO insureds. Nor does the Court
18 find the requests vague, requiring further clarification, or failing to meet the Rule 26 requirements
19 of relevance and proportionality.

20 The Court does, however, agree with GEICO some limitations on these and other requests
21 are warranted. For instance, plaintiff should provide and clarify the applicability of the February
22 20, 2019 Protective Order (Dkt. 23) to any documents produced, and thereby address GEICO’s
23 concerns regarding any proprietary information. Plaintiff should also limit the requests to the

1 disclosure of materials for the six years before the filing of the initial Complaint, the same time
2 limitation applied in relation to the motion to compel.³ In addition, Requests 9 and 10 – seeking,
3 respectively, “instructions provided to [the third party] for completing medical assessments on
4 behalf of GEICO” and “relating to [the third party’s] instructions to individual doctors or those
5 performing medical examinations on behalf of GEICO” – should, like the preceding requests, be
6 limited to generic forms and accompanied by the clarification the third party is not being asked to
7 produce copies of completed medical assessments performed by the third party or its doctors. (Dkt.
8 61, Exs. 1-3)

9 The Court also agrees with GEICO’s opposition to Request 8. In this request, plaintiff
10 seeks documents or information “relating to medical assessments provided to [the third party] by
11 GEICO, or exchanged between GEICO” and the third party and “relating to the contractual
12 relationship” between GEICO and the third party, but does not require the production of completed
13 medical assessments performed. (*Id.*) As argued by GEICO, this request does not adequately
14 describe the documents or information sought, and appears overbroad, vague, ambiguous, and not
15 proportional to the needs of this case. Unless plaintiff is able to provide the necessary clarification
16 of the documents and information sought in this request and show its compliance with the findings
17 in this Order, it should not be included in any modified SDT provided to a third party.

18 The Court, finally, observes that GEICO does not offer any specific objection to the first
19 two requests in each SDT – seeking basic information regarding the person in possession and
20 control of documents produced and the person responding to the requests – or to the final request

21
22 ³ At hearing, the total number of claims discussed began on July 24, 2012 and continued through
23 January 3, 2019 (when GEICO obtained a list of its PIP claims for responding to Plaintiff’s discovery requests). (Dkt. 56 at 3.) As before, the Court recognizes GEICO disputes the appropriate time frame for the claims alleged in this lawsuit, but declines to decide the issue at this time.

1 in the MCN SDT – seeking documents and information relating to any medical examination of
2 plaintiff performed on behalf of GEICO. (*Id.*) These requests need not be modified.

3 B. Medical Examination Reports

4 In the Order addressing plaintiff's motion to compel, the Court considered GEICO's
5 provision of a total number of GEICO PIP claims made in Washington during the six-year class
6 period plaintiff alleged is appropriate for discovery, July 24, 2012 through January 3, 2019, and
7 ordered GEICO to utilize a qualified expert to select 500 of those claims at random and use the
8 data from that sample to respond to plaintiff's discovery requests. (Dkt. 56 at 3.) Production from
9 the sample was to include, *inter alia*, any direct correspondence between GEICO and any
10 physician or medical provider that discusses or involves an IME being performed by the medical
11 provider to an individual claimant, and all correspondence and/or records of communication
12 between GEICO and a GEICO insured including the phrases "maximum medical improvement"
13 or "MMI." (*Id.* at 3-4.)

14 The Court acknowledged GEICO's dispute as to the proper time frame for claims alleged
15 in the lawsuit, but declined to then decide the issue. The Court indicated GEICO could redact any
16 personal identifying information and/or sensitive medical or other such information and that all
17 information disclosed would be subject to the February 20, 2019 Protective Order. Further,
18 plaintiff and his counsel were not to use any information obtained, either from GEICO or any third
19 party, as a lead, means or method for contacting any GEICO insured, customer or any person
20 claiming PIP benefits by or through a GEICO Policy before certification of a class, but were not
21 precluded from current, on-going attempts to communicate with potential claimants through means
22 other than GEICO's responses to discovery.

23 The SDTs, in Request 11, seek the following:

1 All completed medical examination reports performed by [the third
2 party] on behalf of GEICO in the State of Washington between July
3 24, 2012 and July 7, 2018. In responding to this request, personal
4 identifying information, such as name, address and telephone
5 number may be redacted. Specific medical information, such as
6 injuries, may also be redacted. Any redactions, however, should not
7 prevent Plaintiff from determining 1) whether this medical
8 examination included a request to address [MMI], 2) the medical
9 provider's conclusions relating to any request to address MMI, 3)
10 and any date identifying when MMI has been, or will be, reached.

11 (Dkt. 61, Exs. 1-3.) As argued by GEICO, this request seeks claim information exceeding that
12 allowed for in the representative sample of claims for class certification discovery. The Court's
13 Order provided for the production of relevant documents from that sample, which GEICO asserts
14 included "*relevant IME reports from third-party providers[.]*" (Dkt. 65 at 3 (emphasis retained).)
15 This ruling accounted for GEICO's objection that a search for all IME-related documents would
16 be unduly burdensome, requiring a file-by-file manual search of a very large total number of claim
17 files (*see* Dkt. 53), and provided for GEICO's stipulation the 500 claims constituted a statistically
18 valid sample of the total number of PIP claims in Washington during the alleged putative class
19 period. It also protected against GEICO's concern information obtained would be utilized as a
20 means to search for new class representatives or individual claimants prior to certification of a
21 class. Plaintiff's current third-part discovery request for medical examination reports performed
22 by the third party on behalf of GEICO necessarily seeks discovery exceeding that found relevant
23 and proportional to the needs of this case at this stage in the proceedings.

24 Contrary to plaintiff's contention, GEICO did not waive and is not judicially estopped from
25 offering its objections to this request. GEICO's current position in relation to the discovery request
26 is, instead, consistent with that previously offered. *See Ah Quin v. County of Kauai Dept. of*
27 *Transp.*, 733 F.3d 267, 749-50 (9th Cir. 2013) (factors informing the applicability of judicial

estoppel include, *inter alia*, whether a party's later position is "clearly inconsistent" with its earlier position) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)) (internal quotation marks omitted). Nor does GEICO lack standing. "[A] party clearly has standing to seek a protective order to limit discovery from a third party[.]" and third-party subpoenas must meet the relevance and proportionality requirements of Rule 26. *Silcox*, 2018 WL 1532779 at *3. Moreover, as argued both in GEICO's opposition and the third-party objections to the SDTs, good cause exists for an order precluding the discovery request under Rule 26(c)(1). That is, a response to Request 11 requires a search for and production of documents spanning a five-year period, necessitates redaction of confidential and protected health information, and would impose undue burden and expense on the responding parties.

GEICO is, in sum, entitled to a protective order, prior to a ruling on class certification, forbidding the disclosure of the documents and information sought in Request 11. Plaintiff shall exclude any such request from modified SDTs submitted to the third parties.

CONCLUSION

The Court GRANTS in part and DENIES in part defendant's Motion for Protective Order. (Dkt. 61.) Modified SDTs submitted to Dane Street, MCN, and MES, and any other third-party vendors or providers, shall comply with the limitations set forth in this Order and be consistent with the Order Granting in Part and Denying in Part Plaintiff's Motion to Compel (Dkt. 56). The Clerk is directed to send a copy of this Order to the parties and to the Honorable Richard A. Jones

DATED this 30th day of April, 2020.



Mary Alice Theiler
United States Magistrate Judge